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In the Supreme Court of the United States

OCTOBER TERM

RUSSELL W. CHAPLAIN, JR.,
Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

WILLIAM GERALD CHAPLAIN,
Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

RUSSELL W. CHAPLAIN, SR.
and
ELSIE B. CHAPLAIN,
Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

PETITION FOR CERTIORARI

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15 pp

QUESTION PRESENTED FOR REVIEW

Whether Appellants were denied the rights secured to them by the Due Process Clause of the Fifth Amendment of the United States Constitution when the United States Tax Court held that, pursuant to 26 U.S.C. §6213(a) they were barred from challenging deficiency determinations made by the Commissioner of Internal Revenue, even though they did not acquire actual knowledge that the Commissioner was making such deficiency determinations against them until after the period prescribed by that statutory section for challenging a deficiency determination had passed.

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REFERENCE TO OPINIONS BELOW

1. Memorandum Sur Order of the United States Tax Court dated August 1, 1982. (Appendix A - 1)

2. Order of the Tax Court vacating its Order of August 1, 1982, and dismissing Appellants' Petitions dated February 4, 1983. (Appendix A - 15)

3. Opinion of Fourth Circuit Court of Appeals dated March 29, 1984, affirming the Tax Court decision. (Appendix A - 36)

4. Order of the Fourth Circuit Court of Appeals denying Appellants' Petition for Rehearing dated May 4, 1984. (Appendix A - 45)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment sought to be reviewed is the decision of the United States Tax Court dated February 4, 1983, holding that the Appellants were barred from challenging the deficiency

determinations made by the Commissioner by reason of 26 U.S.C. §6213(a). This decision was affirmed by the United States Fourth Circuit Court of Appeals on March 29, 1984. A Petition for Rehearing was then filed by Appellants, and was denied by Order dated May 4, 1984. This Court has jurisdiction pursuant to 28 U.S.C. §2101(c) and Rule 17(c), Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 6213(a)

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of

Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has beome final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the

beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

STATEMENT OF THE CASE

The Appellants, Russell W. Chaplain, Sr., his wife Elsie B. Chaplain, William G. Chaplain and Russell W. Chaplain, Jr., filed petitions in the United States Tax Court for the redetermination of income tax deficiencies asserted by the Commissioner of Internal Revenue ("the Commissioner") for the years 1975 and 1976, and with respect to Russell W. Chaplain, Jr., 1974 as well. The Commissioner moved to dismiss on the grounds that, since the

petitions were not filed within ninety days after the mailing of the notices of deficiency pursuant to 26 U.S.C. §6213(a), they were not timely filed and, hence, the Tax Court lacked jurisdiction. The Tax Court initially found in favor of the Appellants, finding that the Appellants, through no fault of their own, had not received actual notice of the deficiency determinations and that "realism and justice" dictated their petitions for redetermination of the deficiencies be deemed timely filed within ninety days of the date they first received actual notice of the asserted deficiencies and additions to tax, i.e., late October or early November, 1980, rather than the date of mailing,

April 10, 1980. On rehearing, however, the Tax Court vacated its previous order, found that delivery of the deficiency notices, although unsuccessful, had been twice attempted by certified mail, and that the Appellants' petitions were time-barred because not filed within ninety days from the date of mailing and granted the motion to dismiss.

ARGUMENT

It is conceded that the first time Appellants ever received actual notice of the asserted deficiencies and additions to tax claimed by the Commissioner was in late October or early November, 1980, when they were billed

therefor by the Internal Revenue Service. Upon receiving such notice, they acted promptly to file their petitions challenging the deficiency determinations.

Considered in the light most favorable to the Commissioner, the evidence shows that twice the postal service attempted to deliver the notices of deficiencies, sent certified mail, to each of the appellants on April 11 and April 17, 1980. The District Director of the Internal Revenue Service received notices from the post office that the deficiency notices were unclaimed on April 30 and May 5. The deficiency notices themselves were returned unclaimed to the District Director on May 15, 1980. After the two attempts at

delivery by the postal authorities were unsuccessful and the deficiency notices returned the Internal Revenue Service, although aware that service on Appellants had not been successful, attempted no other mode of service.

The notices of deficiency totalled $1,836,703.58. The Tax Court in its original order of August 1, 1982, noted that the deficiencies and additions to tax in each case appeared to be duplicative, to some extent, of the deficiencies asserted in the other cases (Memorandum Sur Order p.6 fn.2.). On their face, the notices of deficiency showed they were incorrect and products of arbitrariness and exaggeration on the part of the Commissioner. The

Tax Court noted other previous litigation involving similar adjustments in which the Appellants were involved and concluded that if such litigation furnished any indication of the merits of the determination of deficiency of which Appellants now complain there was "enough 'water' in the deficiencies...to float the proverbial battleship."

By the time the Appellants received actual notice of the deficiencies and additions to tax claimed by the Commissioner, the time provided by 26 U.S.C. §6213(a) to challenge the deficiencies without paying them had run. Appellants therefore were left with no meaningful opportunity to challenge the deficiency

determinations. Their only recourse was to pay the sum of $1.8 million dollars--an impossibility--then sue for a refund.

Due process is not a static concept. "(W)hat constitutes due process of law can only be answered in relation to the circumstances of each particular case; due process varies with the subject matter and the requirements of each situation," Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 165 (6th Cir. 1973). Thus, what is permitted by the Due Process Clause in one situation may violate it in another. The more serious the deprivation, the more extensive procedural safeguards are called for, Saville v. Treadway, 404 F.

Supp. 430, 432 (M.D. Tenn. 1974). The due process standard to be applied in any given case "depends upon the balancing of various factors, including the nature of the private right or interest that is threatened, the extent to which the proceeding is adversarial in character, the severity in consequences of any action that might be taken, the burden that would be imposed by requiring use of all or a part of the full panoply of trial-type procedures, and the existence of other overriding interests..." Hagopian v. Knowlton, 470 F.2d 201, 207 (2d Cir. 1972). Clearly, Appellants will suffer a heavy burden if the relief they pray for is not granted. They must pay the tax

claimed or, if they do not, their property will be subject to seizure and other means of collection allowed the Commissioner. The Commissioner, knowing that the delivery of the notices of deficiency by certified mail had been unsuccessful, took no further steps to actually notify the Appellants of the asserted deficiencies. There is no indication that to have done so would have imposed any great hardship upon the Internal Revenue Service. The balance tips decidely in favor of the Appellants.

The Tax Court questioned the duplicative character of the deficiency notices. The conclusion is compelling that they were arbitrarily and erroneously made.

Yet, if the Tax Court's decision dismissing Appellants' challenges to the deficiency determinations is allowed to stand, the most arbitrary determination on the part of the Commissioner may be made and, the Appellants left with no remedy but to pay (no matter how exaggerated and fanciful the determinations may be) then, after the danger is done, sue for a refund, with all the additional time, effort and expense that procedure entails. This is an unconscionable result under the Due Process Clause, which aims "to protect (an individual's) use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property..."

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972) rehearing den. 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed.2d 165 (1972). After all, "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States," Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 2084 fn. 5, L.Ed.2d 452, rehearing den. 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974). This, it goes without saying, includes the Commissioner. An arbitrary and excessive deficiency determination will not be judicially condoned, Helvering v. Taylor, 293 U.S. 507, 55 S.Ct. 287,

79 L.Ed. 623 (1935); Andrews v. Commissioner, 135 F.2d 314 (2nd Cir. 1943), cert. den. 320 U.S. 748, 64, S.Ct. 51, 88 L.Ed. 444. In Andrews, the Second Circuit refused to apply the presumption of correctness of a deficiency determination when the evidence showed the determination had been arbitrarily made. In Helvering, this Court held that the taxpayer did not have the burden of proving the correct amount of tax due when challenging a deficiency determination on the ground that it was arbitrarily made.

Ordinarily, notice required for due process purposes is required prior to deprivation, Memphis Light, Gas and Water Division v. Craft, 436 U.S. 198 S.Ct. 1554,

1565, 56 L.Ed.2d 30 (1978). If the Tax Court's ruling dismissing the petitions is upheld, Appellants' right to a meaningful opportunity to be heard was over before, for all they knew, it had even arisen.

The Due Process Clause does not require this Court to rule that 26 U.S.C. §6213 is unconstitutional in every instance. It does require that, given the due process sensitivity to the facts of a particular case, this Court rule that due process has been denied appellants on the facts presented here. This is particularly true in view of the strong indication -- from the Tax Court itself -- that the deficiency determinations are erroneous and duplicative.

Like any other aspect of due

process notice will vary from one situation to another. Notice must be "reasonably calculated" to reach the person to be affected by it, Memphis Light, supra, 98 S.Ct. at 1563. Given the staggering burden imposed on appellants by the Commissioner's assertion of $1.8 million dollars in deficiencies, more than the gesture of sending certified letters and doing nothing when they are returned unclaimed is required. 26 U.S.C. §6213 authorizes transmission of deficiency notices by certified mail, but does not mandate such means of transmission to the exclusion of any other. Despite the fact that in April and May, 1980, the deficiency notices or notices of attempted delivery had

been returned to the District Director marked "unclaimed", the Internal Revenue Service never thereafter attempted to serve the Appellants with the deficiency notices by any other means. Such action--or, to be more accurate, such inaction--was not "reasonably calculated" to give to the Appellants the notice they were required to have under the Due Process Clause and therefore the application of the ninety-day limitation of 26 U.S.C. §6213(a), as applied to the facts of this case, is unconstitutional. In Community Thrift Club, Inc. v. Dearborn Acceptance Corporation, 487 F.Supp. 877 (N.D. Ill. 1980), the Court held, in a suit challenging the Illinois wage

garnishment law, that the provision of that law providing for service of an alias summons upon the employer of a debtor who had confessed judgment after one unsuccessful attempt at personal service upon the debtor himself did not meet due process requirements, where the debtor's employer was under no obligation to notify the debtor and a copy of the complaint underlying the confessed judgment did not have to accompany the summons. The Court noted, id. at 885, that it saw no "practical problems preventing either continued efforts at personal service or a requirement that the employer notify the employee of the action." In Palmer, supra, the Court of Appeals approved a

District Court requirement that termination of gas service be preceded by a personal visit by a utility company representative with a customer or some responsible adult member of his household and for certified mail, return receipt requested, only if the customer were unavailable. As the Court there noted, id. at 166, "(n)otice must be one which is designed to actually inform the consumer of the proposed termination of service, and the reason for the proposed termination..." (emphasis added). In Craig v. Carson, 449 F.Supp. 385, 395 (M.D. Fla. 1978), a case challenging the constitutionality of city ordinances allowing supposedly abandoned automobiles to be impounded, the Court observed

the complete lack of provisions in the challenged ordinances for notice to the owner of the impounded vehicle, even though his identity and address could be easily and quickly obtained from a computer search. Only "an immediate, individual notice, at a person's motor vehicle registration address" would suffice for due process standards, said the Court, id. As has been noted previously, here the Commissioner could easily have resorted to other means to give the Appellants actual notice. No hardship would have been occasioned to him by doing so.

Here, for the Appellants to pay $1.8 million dollars and then sue for a refund is not a meaningful, adequate remedy. They do not have

$1.8 million dollars to pay the asserted deficiencies. Their property is therefore subject to all the drastic measures the Internal Revenue Code gives the Internal Revenue Service to collect taxes. That they may ultimately prevail will be of little comfort if their lives and businesses are ruined. This Court in Fuentes, supra, 92 S.Ct. at 1994, addressed the contention that a post-deprivation hearing at which the individual's property wrongfully seized could be returned to him or damages awarded to him sufficed for due process purposes. According to the Court, it did not, id. at 1995:

> But no later hearing and no damage award can undo the fact that the arbitrary taking that was

> subject to the right of procedural due process has already occurred. "This Court has not...embraced the general proposition that a wrong may be done if it can be undone." Stanley v. Illinois, 405 U.S. 645, 647, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551.

See also Memphis, supra, 98 S.Ct. at 1565 ff.

CONCLUSION

For the reasons stated above, this Petition for Certiorari should be granted.

RUSSELL W. CHAPLAIN, JR.
WILLIAM GERALD CHAPLAIN
RUSSELL W. CHAPLAIN, SR.
AND
ELSIE B. CHAPLAIN

By _____
Of Counsel

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing PETITION FOR CERTIORARI was mailed/delivered to the Honorable Rex E. Lee, Solicitor General of the United States, 10th and Constitution, N.W., Washington, D.C. 20530, the Honorable Glenn L. Archer, Jr., Assistant Attorney General, United States Department of Justice, Washington, D.C., 20530; and to Michael L. Paup, Gary R. Allen and John P. Griffin, Attorneys, Tax Division, United States Department of Justice, Washington, D.C., 20530, this 24 day of August, 1984.

Augustus Anninos

APPENDIX

Memorandum Sur Order of the United States Tax Court dated August 1, 1982

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

WILLIAM GERALD CHAPLAIN,
RUSSELL W. CHAPLAIN, SR.,
and ELSIE B. CHAPLAIN,
RUSSELL W. CHAPLAIN, JR.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 20130-80
20190-80
20191-80

Memorandum Sur Order

These cases are before the Court on respondent's motion in each case to dismiss for lack of jurisdiction on the ground that the

petition in each case was not filed within the time prescribed by law, section 6213(a).[1]

The petitioners are family members. Russell W. Chaplain, Sr. ("Wilson") and Elsie B. Chaplain are husband and wife. William Gerald Chaplain ("Gerry") and Russell W. Chaplain, Jr. ("Chappie") are sons of Wilson and Elsie. These petitioners, together with other members were parties petitioner in extensive litigation in this Court involving a protacted trial at Norfolk, Virginia, in April and May 1979, in which the opinion of the Court was filed on September 23, 1980, T.C. Memo 1980-423, Ocean Sands Holding

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[1]All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

Corporation v. Commissioner. The report of Special Trial Judge Aarons, who conducted the trial, was filed and served on the parties on January 8, 1980.

Among the properties owned and operated by the Chaplain family corporations are the Kona Kai Motel at 18th Street and Ocean Front, and the Kona Kai East at 16th Street and Ocean Front, both in Virginia Beach, Virginia.

The Kona Kai is open and in operation throughout the year, while the Kona Kai East is closed during the off season, from October until the following spring. The books and records and the principal office of both motels are located in the Kona Kai at 18th and Ocean Front, and the office manager is

one of Wilson's and Elsie's daughters, Suzanne Chaplain Goldsticker. The Postal Service delivers mail for both motels to the Kona Kai. Suzanne lives at the Kona Kai, and she pursues her managerial duties from dawn throughout the day. During the time here material, Gerry took care of maintenance and security at both motels.

On April 10, 1980, respondent sent by certified mail notices of deficiency, as follows:

Petitioner

William G. Chaplain

Address on Notice of Deficiency

16th and Ocean Front
Virginia Beach, Virginia

Years	Deficiencies
1975	$114,800.19
1976	171,679.49

Additionals to Tax

sec. 6653(b)	sec. 6654
$57,400.10	$--
85,839.75	$--

Petitioner

Russell W. Chaplain, Sr.

and Elsie B. Chaplain

Address on Notice of Deficiency

16th and Ocean Front

Virginia Beach, Virginia

Years	Deficiencies
1975	$ 99,293.83
1976	165,309.49

Additions to Tax

sec. 6653(b)	sec. 6654
$49,641.92	$4,269.74
82,654.74	6,156.76

Petitioner

Russell W. Chaplain, Jr.

Address on Notice of Deficiency

18th and Ocean Front

Virginia Beach, Virginia

Years	Deficiencies
1974	$371,487.72
1975	108,630.19
1976	171,049.49

Additions to Tax	
sec. 6653(b)	sec. 6654
$ 185,743.86	$11,856.11
54,315.10	4,690.68
85,524.75	6,359.67

Respondent filed the subject motions to dismiss and a hearing thereon was held, at which each of the petitioners and Suzanne testified.

Section 6213(a) provides that within 90 days (or 150 days if the

notice is addressed to a person outside the United States) after a notice of deficiency is mailed, the taxpayer may file a petition with the Tax Court for redetermination of the deficiency. Section 6212(b)(1) "provides with an exception not here pertinent, that when the notice is mailed to the taxpayer's 'last known address,' it is 'sufficient' ever if the taxpayer is dead or is under a legal disability or has terminated its corporate existence. Despite the seemingly non-mandatory language of subjection (b), some courts have at least suggested that there is thereby imposed a necessary condition to the validity of every deficiency notice, namely, that the Commissioner mail it to

the taxpayer's last known address." Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 372 (1974), affirmed in an unpublished opinion (9th Cir. 1976).

In Looper v. Commissioner, 73 T.C. 690, 696 (1980, this Court defined "last known address" as "that address to which, in light of all the facts and circumstances, the respondent reasonably believed the taxpayer wished the notice to be sent."

In the present cases, it is clear that the respondent mailed the notices by certified mail, and considering the evidence as to what respondent "reasonably believed [to be the address that the petitioners] wished the notice[s] to be sent," we are persuaded that

the notices were sent to petitioners' last known addresses. It is likewise clear that petitioners never received those notices of deficiency after they were mailed and did not learn of their existence until some 10 months later when they received bills for the deficiencies and additions to tax from the Memphis Service Center. Petitioners saw the actual notices of deficiency for the first time at the hearing on the subject motions, almost two years after they were mailed.

Several cases have held that it does not matter that the taxpayers failed to receive the notices of deficiency. Houghton v. Commissioner, 48 T.C. 656 (1967); Brown v. Lethert, 360 F.2d 560

(8th Cir. 1966); Luthering v. Glotzback, 304 F.2d 556 (4th Cir. 1962). However, it is believed that there is a critical difference between those cases and the present cases. In each of those cases, there was an attempt to deliver the notice of deficiency, which was foiled because the taxpayer failed to respond to a notice of certified mail left by the postal authorities. In the present case, by contrast, there was no attempt to deliver the notices of deficiency. This is shown by the fact that, according to the stamp on the envelopes in which they were mailed, the first notice was left on April 30, 1980, while on that very date the notices were back in the office of the sender, the

District Director in Richmond, and would have had to have left the Virginia Beach post office at least a day earlier. Mrs. Goldsticker, who did receive the notice of deficiency addressed to her, a notice mailed (as were those to petitioners) on April 10, and timely filed her petition, testified unequivocally that she received neither the notices of deficiency addressed to her parents and her brothers or notices of certified mail from the Postal Service. There was not a single question directed to Mrs. Goldsticker on cross-examination. We are futher convinced that there was no attempt on the part of petitioners to "duck" the notices of deficiency. They had just

concluded successful litigation with the respondent in their cases in the Ocean Sands group, and they were aware of their success -- Special Trial Judge Arron's report had been served upon them on January 8, 1980, three months prior to the mailing of the notices of deficiency involved in the present cases.

The purpose of the notice of deficiency procedure is to give taxpayers an opportunity to litigate asserted deficiencies in this Court prior to payment of the same, by filing a petition with this Court within the time specified in section 6213(a). The present petitioners never had that oportunity, [2] not through any

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[2]Such an opportunity was particularly valuable to these

fault of their own but through the failure of the Postal Service, which must be regarded as the agent of the respondent, to deliver or even to attempt to deliver the notice of deficiency.

In the unusual circumstances presented by these cases, we believe that realism and justice require that the 90-day period provided in section 6213(a) should be measured, not (as in the usual case) from April 10, 1980, when the

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petitioners in light of the outsized amounts of deficiencies and additions to tax in each case, which appear to be, to some extent, duplicative of the deficiencies in the other cases. If the prior Oceans Sands litigation, involving adjustments similar to those here, furnishes any indication of the merits of the present cases, there is enough "water" in the deficiencies here to float the proverbial battleship.

notices were mailed, but from the time in late October or early November of that year, when petitioners received the bills from the Service Center and learned for the first time of the existence of the asserted deficiencies and additions to tax. When so measured, their petitions were timely filed. Cf. McKaig v. Commissioner, 51 T.C. 331 (1968).

Respondent's motions to dismiss should be denied, and he should proceed to answer or otherwise move with respect to the petitions within the times prescribed by Rule 36(a) of this Court's Rules of Practice and Procedure.

Apropriate orders will be issued.

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Order of the Tax Court vacating its Order dated August 1, 1982, and dismissing Appellants' Petitions dated February 4, 1983

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

WILLIAM GERALD CHAPLAIN, ET AL

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 20130-80

20190-80

20191-80

Memorandum Sur Order

CALDWELL, Special Trial Judge: These cases are before the Court on respondent's motion in each case for reconsideration of opinion and revision of order, filed on September 17, 1982. Hearing was

held on those motions on November 10, 1982, at the conclusion of which they were taken under advisement. Counsel representing all petitioners except Russell W. Chaplain, Sr., filed a brief on December 20, 1982, in response to the brief of respondent which accompanied his motions. With leave of Court, respondent has filed a reply to petitioners' argument on January 20, 1983.

The opinion complained of is the memorandum sur order which accompanied the orders dated August 1, 1982, denying respondent's motions to dismiss for lack of jurisdiction.

Respondent's motions to dismiss were predicated upon the asserted ground that the petition in each

case had not been timely filed within the 90-day period following the mailing of the notices of deficiency on which the petitions were based, as provided in section 6213(a).[1] Those motions were denied for the reasons stated in an accompanying memorandum sur order. Such reasons may be summarized, as follows. Based upon an identical notation appearing on the envelope in which each of the notices of deficiency had been sent by certified mail, it was found that the Postal Service had never attempted to deliver the notices of postal deficiency to petitioners. In that circumstance, it was held that petitioners should be allowed

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[1]All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

90 days from receipt of subsequently issued notices of assessment and demand for payment, the first time they learned of the deficiencies, within which to file their petitions. Since the petition in each case was filed within such 90-day period, they were deemed to have been timely filed and the motions to dismiss were accordingly denied.

In his motion for reconsideration, respondent urges that the proper mailing of a notice of deficiency to the last known address of a taxpayer (as was found in the previous memorandum to have been done) is all that is required; and if for any reason the taxpayer does not receive the notice, that it is immaterial. Respondent

further urges that the Court misconstrued the evidence and that, when properly construed, the evidence shows that delivery of each notice of deficiency was in fact attempted.

The Court has carefully considered the cases relied upon by respondent -- United States v. Ahrens, 530 F.2d 781 (8th Cir. 1976); DeWelles v. United States, 378 F.2d 37 (9th Cir. 1967); Luhring v. Glotzback, 304 F.2d 560 (4th Cir. 1962); Pfeffer v. Commissioner, 272 F.2d 383 (2d Cir. 1959); Zenco Engineering Corp. v. Commissioner, 75 T.C. 318 (1980), affirmed by order (7th Cir. Nov. 1, 1981); Cataldo v. Commissioner, 60 T.C. 522 (1973), affd. per curiam 499 F.2d 550 (2d

Cir. 1974); August v. Commissioner, 54 T.C. 1535 (1970; DeLuca v. Waters, an unreported case (D. Mass. 1974, 35 A.F.T.R. 2d 75-84), 75-1 U.S.T.C. par. 1909) -- as well as in Lewin v. Commissioner, T.C. Memo. 1976-355, which was not cited by respondent. In each of these cases, except Cataldo, Zenco, DeLuca, and Lewin, there was no question that delivery had been attemped by the postal authorities. And, in Zenco, DeLuca, and Lewin, the courts found, contrary to the contentions of the taxpayers there involved, that delivery had been attempted. In none of those cases, was it established that delivery had not been attempted.

For the reasons stated in the previous memorandum sur order, in a

case -- and it will probably be an exceedingly rare one -- where a notice of deficiency was properly mailed but the taxpayer establishes to the satisfaction of the Court that he never such notice due to the failure of the Postal Service to deliver or attempt to deliver, the taxpayer should be permitted 90 days from the date on which he receives actual notice to file his petition. Cf. McKaig v. Commissioner, 51 T.C. 331 (1968); Kennedy v. United States, 403 F.Supp. 619 (W.D. Mich. 1974), affirmed 556 F.2d 581 (6th Cir. 1977); Tangren v. Mihlbachler, 522 F.Supp. 701 (D. Colo. 1981).

Turning to the second ground urged by respondent in the pending motion, having to do with the

Court's misconstruing of the evidence, in the previous memorandum sur order, the Court noted that the following appeared on each envelope in which the notices of deficiency had been mailed and which had been returned to the sender marked "Unclaimed":

Name_____

1st Notice 4/30/80

2nd Notice 5/5/80

Return 5/15/80

A stamp on each of those envelopes showed that the notices of deficiency had been received back in the office of the issuing District Director in Richmond on April 30, 1980.

Based upon this evidence, it was found that no delivery had been attempted since on the very first

date appearing in the notations the deficiency notices were not even in the hands of the Postal Service authorities but were, rather, in the possession of the District Director.

Based upon a consideration of an affidavit attached to the motion for reconsideration and from the testimony of the affiant, Adolph P. Chiappa, the Court is satisfied, that the above-described "notice" markings on the envelopes pertained, not to notice of the addresses by the postal authorities in Virginia Beach (where petitioners lived) that there was certified mail at the post office to be picked up by them -- as we construed the markings. Rather such markings were placed by the

Richmond post office after the letters had been returned to that city from Virginia Beach and were for the purpose of notifying the sender, the District Director, to pick up the letters which had been returned, marked "unclaimed." Those markings simply have no bearing on the disposition of the motions to dismiss, and they must accordingly be disregarded.

In addition to the above-described notations, each envelope bears a stub detached from Postal Service Form 3849-A which we failed to take cognizance of in our previous consideration of these cases that lead to the orders of denial and the supporting memorandum sur order. The stub on the envelope containing the notice

of deficiency addressed to William G. Chaplain (Docket No. 20130-80) contained the following:

Claim Check

739520

Date

4-11

1st Notice

4-17

2d Notice

Return

4-26

The stubs on the envelopes containing the notices of deficiency in the other two cases were identical, except for the serial numbers.

From the affidavit and testimony of Mr. Chiappa, we find that, under the practices and procedures of the Postal Service in

accordance with its regulations, a carrier having a peice of certified mail for delivery (hereinafter, "certified letter") takes it to the address on the certified letter and attempts to deliver the same and to obtain the signature of the recipient. The document on which the recipient's signature is sought is a 3"x5" card (Form 3849-A), called a "Delivery Notice or Receipt" which is attached at a perforation to the above-described stub. If there is no one present to sign for the certified letter, the carrier leaves the Form 3849-A in the mailbox of the addressee, which informs the addressee that there is a piece of certified mail to be picked up at the post office. At that moment the carrier attaches

the stub (by means of adhesive on the reverse thereof) to the certified latter envelope and notes on the stub, on the list "1st Notice" line, the date on which the notice was placed in the mailbox. The carrier then takes the certified letter back to the post office where it is held for four or five days for the addressee to pick it up. If the certified letter is not picked up during that time, the carrier again takes the certified letter back to the address thereon to attempt delivery a second time. If there is someone present to receive the letter, the recipient's signature is obtained on another copy of the Form 3849-A. If there is no one present to receive and sign for the certified letter, the

Form 3849-A is placed in the mailbox and the carrier at that moment notes on the stub the date the second notice was placed in the mailbox. The carrier takes the certified letter back to the post office where it is held for several days to be picked up by the addressee. If it is not picked up within that time, the certified letter is returned to the originating post office bearing a stamp directing that it be returned to the sender for the reason that it was "unclaimed."

Thus, in accordance with the foregoing practices and procedures, if the Postal Service employees followed those practice and procedures, they twice unsuccessfully attempted, on April

11 and 17, 1980, to deliver the envelopes containing the notices of deficiency here involved and left a Form 3849-A notice on each occasion. The envelopes were not picked up and they were returned from the Virginia Beach post office to the Richmond post office on April 26, 1980.

It was stated in Charlston Realty Company v. United States, 334 F.2d 434, 442 (Ct. Cls. 1967):

> Postal employees are presumed to discharge their duties in a proper manner. [Citations omitted]

The evidence adduced by petitioners in these cases to rebut that presumption was their testimony and that of Suzanne Goldsticker, daughter of the parent-petitioners and sister of

the two other petitioners. The thrust of that testimony was that neither the notices of deficiency nor the Forms 3849-A notices to pick up the certified letters were received. Quite obviously, petitioners did not get the notices of deficiency, and the question is were there attempts by the postal authorities to deliver those notices.

The situation is similar to that which faced this Court in the Zenco case, supra, where this Court said (75 T.C., p 323):

> Petitioner argues that Zenkich's affidavit and the stipulated testimony of petitioner's employees established a prima facie case that the post office somehow misdirected the correctly addressed and properly certified notice of deficiency. We disagree. * * * To show mishandling of an

otherwise adequate notice of deficiency by postal authorities, more is required than the bald testimony of a taxpayer or its employes that they never got the letter.

There is a strong presumption in the law that a properly addressed letter will be delivered, or offered for delivery, to the addressee. United States v. Ahrens, supra; Cataldo v. Commissioner, supra; August v. Commissioner, supra. Any other rule would impose unwarranted requirements upon respondent and would render meaningless the plain language of section 6213(b)(1). Moreover, tax cases could all become farcical swearing contests, with impermissibly high rewards for false testimony, if we awarded unconditional relief to every taxpayer who was willing to testify tht he had not received the notice of deficiency. See DeLuca v. Walters, supra.

The documentary evidence in this case shows that on July 3, 1979, someone at petitioner's post office refused to sign for

the certified notice of deficiency, which plainly bore respondent's return address. There is absolutely no indication in the written record that anything was amiss in the normal handling of the letter in question. In these circumstances, we have no adequate grounds for holding that the notice of deficiency was not properly mailed to petitioners at its last known address.

Also, in Lewin v. Commissioner, supra, this Court stated:

During the course of their testimony, petitioners stated tht they had been instructed by their attorney to expect the imminent arrival of a notice of deficiency from respondent. They further claimed that, heeding this advice, they kept a lookout for its prospective arival and received neither the letter nor the Forms 3849 indicating that such mail was being held for them at their post office.

Postal records kept in the ordinary course of

> business, however, indicate that such was not the case. Rather, these records show that, on two occasions, Forms 3849 were left at petitioners' residence. Petitioners have offered no evidence that would impugn the probity of these records nor any evidence that would corroborate their story. In view of this documentary evidence and lack of satisfactory evidence to the contrary, we are satisfied that the postal employees involved properly discharged their duties. Charlson Realty Co. [v. United States], 384 F.2d 343 (Ct. Cl. 1967).

In a similar situation prevailing in the DeLuca case, supra, the District Court reached the same result.

In the present case, we must likewise hold that the documentary evidence as explained by Mr. Chiappa on his affidavit and in his testimony, establishes that the

postal authorities did twice attempt to deliver the notices of deficiency and that they left the Forms 3849-A notifying petitioners to pick up the certified letters at the post office. So holding, those cases come within the rule enunciated in Luhring v. Glotzbach and the other cases relied upon by respondent, that were the notice of deficiency is sent by certified or registered mail to the taxpayer at his last known address, that is sufficient; and it makes no difference that the taxpayer did not receive such notice.

In accordance with the foregoing, respondent's motion for reconsideration and revision must be granted and the prior orders denying his motion must be vacated

and set aside and orders entered granting his motions to dismiss for lack of jurisdiction.

Appropriate orders will be entered.

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Opinion of Fourth Circuit Court of Appeals dated March 29, 1984, affirming the Tax Court decision

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1610

Russell W. Chaplain, Jr.,

Appellant,

v.

Commissioner of Internal Revenue,

Appellee.

No. 83-1616

William Gerald Chaplain,

Appellant,

v.

Commissioner of Internal Revenue,

Appellee.

No. 83-1617

Russell W. Chaplain, Sr., and

Elsie B. Chaplain,

Appellants,

v.

Commissioner of Internal Revenue,

Appellee.

Appeals from the United States Tax Court. Judge Dawson, Tax Court Judge. (Tax Court Nos. 20191-80, 20130-80, 20190-80)

Submitted: Januay 23, 1984

Decided: March 29, 1984

Before SPROUSE, ERVIN, and CHAPMAN, Circuit Judges.

(H. Thomas Padrick, Jr., Anderson and Padrick, on brief for Appellants Russell W. Chaplain, Jr., William Gerald Chaplain and Elsie B. Chaplain. Russell W.

Chaplain, Sr., Appellant Pro Se. Glenn L. Archer, Jr., Assistant Attorney General; Michael L. Paup, Gary R. Allen, John P. Griffin, Attorneys; Tax Division, United States Department of Justice, on brief for the Appellee.)

PER CURIAM:

The Chaplains petitioned the United States Tax Court for a redetermination of the Commissioner's assertion of deficiencies. The Commissioner filed a motion to dismiss for lack of jurisdiction because the petitions were not filed within 90 days after the notices of deficiencies were mailed, as required by Section 6213(a) of the Internal Revenue Code. After a

hearing, the court found that the postal service had not attempted to deliver the notices and, therefore, the 90-day period did not commence until the Chaplains first learned of the notices, when they were billed for the deficiencies. The Commissioner filed a motion to reconsider the opinion and revise the order on the grounds that the court had overlooked evidence indicating that the delivery had been attempted. The court held another hearing and found that delivery had been attempted, and, therefore, the 90-day period ran from the date the Commissioner mailed the notices. Thus, the court granted the reconsideration motion, vacated the prior order, and dismissed the actions for lack of

jurisdiction. The Chaplains appeal from that dismissal.

The Chaplains assert that the 90-day period of §6213(a), IRC, should not commence at the date the notices of deficiency were mailed because they were residing at the mailing address but did not receive the notices because no delivery was attempted by the postal service.[1] The district court found from the evidence that the postal service had attempted delivery and had left certified mail notices at the

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[1]The Chaplains cite Estate of McKaig v. Commissioner, 51 T.C. 331 (1968), and Tangren v. Mihlbachler, 552 F.Supp. 701 (D. Col. 1981). However, these cases hold that the time for mailing shall initiate the 90-day period unless the IRS has reason to know that the postal service had made a mistake in delivery or that the Commissioner failed to use reasonable care to ascertain the taxpayer's correct address. In this case, there is no evidence of postal service error

Chaplains' residence.[2] We are unable to conclude that the Tax Court's findings are clearly erroneous. Commissioner v. Duberstein, 363 U.S. 28 (1960). Accordingly, because the mailing address was correct and the postal service utilized the standard procedures for delivering the notices, the mailing of the notices by the Internal Revenue Service is all that is required for sufficient notice. Luhring v. Glotzbach, 304 F.2d 556 (4th Cir. 1962). See also Johnson v. Commissioner of Internal Revenue, 611 F.2d 1015 (5th Cir. 1980); Lewin v. Commissioner of

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and the notices contain the correct addresses. Thus, McKaig and Tangren do not apply.

[2]Based on the Tax Court's reasoning, we conclude that the evidence was legally sufficient to support the findings of attempted

Internal Revenue, 569 F.2d 444 (7th Cir.), cert. denied, 437 U.S. 904 (1978); Brown v. Lethert, 360 F.2d 560 (8th Cir. 1966); Cohen v. United States, 297 F.2d 760 (9th Cir. 1962).

Next, the Chaplains claim that the Tax Court violated its own procedural Rule 163 by allowing the Commissioner to join a motion to reconsider with a motion to vacate the decision.[3] Because the Chaplains have not shown that the court's action amounted to an abuse of discretion, we will not disturb the Tax Court's decision. See Louisville & Nashville Railroad Co. v. Commissioner of Internal

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delivery.

[3]The Chaplains also contend that they were not given an opportunity to respond to the Commissioner's motion. However, the record

Revenue, 641 F.2d 435, 442-43 (6th Cir. 1981).

Finally, the appellants assert that the Tax Court's decision denies them due process of law because it denies them access to the courts. This claim is meritless because the Chaplains have constitutionally adequate access to the courts to challenge the accuracy of the deficiencies by paying the tax, filing a claim for refund, and, if denied, suing for the refund. See Phillips v. Commissioner, 283 U.S. 589 (1931); Lewin v. Commissioner, 569 F.2d

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indicates that the taxpayers were allowed to present objections at the motion hearing and their post-hearing motions were given due consideration. Thus, we find no merit in this argument.

444, 445 (7th Cir. 1978); Brown v. Lethert, 360 F.2d 560, 562 (8th Cir. 1966); Cohen v. United States, 297 F.2d 760, 772 (9th Cir. 1962).

Accordingly, because the dispositive issues have recently been decided authoritatively, we dispense with oral argument. The judgment of the district court is affirmed.

AFFIRMED.

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Order of the Fourth Circuit Court of Appeals denying Appellants' Petition For Rehearing dated May 4, 1984

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1610

Russell W. Chaplain, Jr.,

Appellant,

versus

Commissioner of Internal Revenue,

Appellee.

No. 83-1616

William Gerald Chaplain,

Appellant,

versus

Commissioner of Internal Revenue,

Appellee.

No. 83-1617

Russell W. Chaplain, Sr.,

and Elsie B. Chaplain,

Appellants,

versus

Commissioner of Internal Revenue,

Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Chapman for a panel consisting of Judge Sprouse, Judge Ervin, and Judge Chapman.

For the Court,

CLERK

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Office - Supreme Court, U.S
FILED
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ALEXANDER L. STEVAS
CLERK

No. 84-187

In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL W. CHAPLAIN, JR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-187

RUSSELL W. CHAPLAIN, JR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners challenge the court of appeals' decision affirming the Tax Court's dismissal for lack of jurisdiction of their petitions for redetermination of income tax deficiencies, a dismissal predicated on the fact that petitioners failed to file their Tax Court petitions within the time prescribed by Section 6213(a) of the Internal Revenue Code.

1. On April 10, 1980, the Commissioner sent to petitioners by certified mail notices of deficiency regarding certain income tax liabilities (Pet. App. A4). The notices were mailed to petitioners at the addresses of two of their family-controlled corporations (*id.* at A4-A6, A8-A9). While another notice, similarly addressed and mailed at the same time to petitioners' daughter, was timely received by her, the notices addressed to petitioners were returned to the IRS by the Postal Service marked "unclaimed" (*id.* at A11, A29). After petitioners were billed by the Commissioner for the

asserted deficiencies, they filed, on October 31, 1980, and November 3, 1980, Tax Court petitions seeking redetermination of the proposed assessments (*id.* at A4-A11).

The Commissioner moved to dismiss the petitions for lack of jurisdiction. He cited the requirement, set forth in Section 6213(a) of the Code,[1] that a Tax Court petition must be filed "[w]ithin 90 days * * * after the notice of deficiency * * * is mailed," whereas petitioners had not filed their petitions until six months after the notices were mailed here. The Tax Court found that the IRS had properly mailed the notices to petitioners' "last known address" (I.R.C. § 6212(b)(1)), yet also found, upon initially considering the case, that the Postal Service had failed to attempt delivery of the notices in question (Pet. App. A8-A10). Given that latter circumstance, the court reasoned, "realism and justice require[d] that the 90-day period provided in section 6213(a) should be measured, not (as in the usual case) from April 10, 1980, when the notices were mailed, but from the time in late October or early November of that year, when petitioners * * * learned for the first time of the existence of the asserted deficiencies" (Pet. App. A13-A14). On that theory, petitioners' Tax Court petitions would have been timely.

The Commissioner moved for reconsideration. The Tax Court held a further evidentiary hearing and found that the Postal Service had in fact attempted delivery of the deficiency notices (Pet. App. A22-A34). The court thus concluded that the 90-day period ran from the April 10 mailing date, vacated its original order, and dismissed the petitions for lack of jurisdiction (*id.* at A33-A35). The court of appeals affirmed in an unpublished per curiam opinion, holding (*id.* at A41) that the Tax Court's factual findings

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

were not "clearly erroneous" and that, "because the mailing address was correct and the postal service utilized the standard procedures for delivering the notices, the mailing of the notices by the Internal Revenue Service [was] all that was required" by the relevant Code provisions.

2. The decision below is correct. Section 6212(a) provides that, if the Commissioner determines a deficiency in income tax, "he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." Section 6212(b)(1) provides that such notice, "if mailed to the taxpayer at his last known address, shall be sufficient for purposes of * * * this chapter." Section 6213(a) in turn provides that a petition for redetermination of the deficiency must be filed in the Tax Court "[w]ithin 90 days * * * after the notice of deficiency authorized in section 6212 is *mailed*" (emphasis added). See *DeWelles* v. *United States*, 378 F.2d 37, 39 (9th Cir. 1967). Failure to meet the 90-day deadline creates an absolute bar to the Tax Court's jurisdiction. *Johnson* v. *Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980); *Deutsch* v. *Commissioner*, 599 F.2d 44, 45 (2d Cir. 1979). Thus, so long as the IRS timely mails a deficiency notice to the taxpayer's "last known address," the Commissioner has fulfilled the statutory requirements and it is immaterial whether or not the taxpayer actually receives the document. See, *e.g.*, *United States* v. *Zolla*, 724 F.2d 808, 810 (9th Cir. 1984); *United States* v. *Ahrens*, 530 F.2d 781 (8th Cir. 1976); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978); *Berger* v. *Commissioner*, 404 F.2d 668, 672 (3d Cir. 1968); *Luhring* v. *Glotzbach*, 304 F.2d 556, 558 (4th Cir. 1962). Both courts below found that the deficiency notices at issue here were properly mailed to petitioners at their last known addresses (Pet. App. A9, A40), and, because petitioners failed to file in the Tax Court

within 90 days of the mailing date, that court was plainly without jurisdiction.[2]

Petitioners, while appearing to concede that their Tax Court petitions were untimely under Sections 6211 to 6213, contend (Pet. 10-27) that the procedures specified by those Sections, as applied to the facts of this case, are unconstitutional under the Due Process Clause. This contention is apparently based on the theory that the challenged Code provisions fail to ensure the availability of a prepayment forum to contest an asserted tax liability where (as here) a notice of deficiency has been properly mailed but not received.

This contention is frivolous. Due process requires only that a taxpayer have an opportunity to contest his tax liability at a meaningful time and in a meaningful manner. *Commissioner* v. *Shapiro*, 424 U.S. 614, 631-632 (1976); *Bull* v. *United States*, 295 U.S. 247 (1935); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931). Wholly apart from the fact that petitioners themselves would appear to bear full responsibility for their failure to receive the deficiency notices, it is settled that, with respect to federal taxes, the opportunity to maintain a suit for refund, after payment of the tax, fully satisfies the requirements of the Due Process Clause. *Bull* v. *United States, supra*; *Phillips* v. *Commissioner, supra*. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 92

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[2]Since Section 6212(b)(1) provides that a notice of deficiency shall be sufficient "if mailed to the taxpayer at his last known address," it is irrelevant in our view whether or not the Postal Service actually attempted to deliver the notices. At all events, the Tax Court ultimately found as a fact that the Postal Service had attempted delivery (Pet. App. A22-A34) and the court of appeals sustained that finding (*id.* at A40-A41).

n.24 (1972) (reaffirming that a pre-collection remedy is not required in the case of federal taxes). The government has no obligation to guarantee the availability of a prepayment judicial forum in which a taxpayer may litigate the correctness of the Commissioner's deficiency determinations. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-747 (1974); *Cohen* v. *United States*, 297 F.2d 760, 772 (9th Cir. 1962); *Jewel Shop* v. *Pitts*, 218 F.2d 692 (4th Cir. 1955).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1984

DOJ-1984-09